

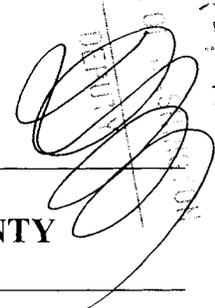
No. 35569-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Futurewise and Friends of Pierce County, Appellants

v.

Pierce County, Respondent

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____


BRIEF OF RESPONDENT PIERCE COUNTY

GERALD A. HORNE
Prosecuting Attorney

By
M. Peter Philley
Deputy Prosecuting Attorney
Attorneys for Pierce County
955 Tacoma Ave. S - Suite 301
Tacoma, WA 98402
PH: (253)798-4173
WSBA No. 14673

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I. INTRODUCTION

A. Historical Background

In 2004, Pierce County enacted Ordinance No. 2004-87s (the **Ordinance**).¹ The Ordinance amended the County's comprehensive land use plan, including designating nearly 30,000 acres as "Agricultural Resource Lands" (**ARL**) pursuant to the agricultural lands requirements of the Growth Management Act (**GMA**). ARL was a new designation that replaced the historic "agricultural" designation. Adoption of the 2004 comprehensive plan was the culmination of a process that began over thirteen years before:

In November 1991, Pierce County first classified and designated agricultural lands of long-term commercial significance on an interim basis pursuant to requirements of the GMA.² In 1994, these interim designation criteria were reviewed and became the final designation criteria for the County's first GMA-required comprehensive plan.³

As a result of applying the criteria, when this first comprehensive plan took effect in 1995, Pierce County had designated approximately

¹ CP 16 - AR 2383 (Pierce County Ordinance No. 2004-87s [**the Ordinance**]).

² The County obtained an extension from the original September 1991 statutory deadline. See RCW 36.70A.380.

³ See CP 16 - AR 2383: Amendment 2, Exhibit B to the Ordinance, at 6 of 66.

17,900 acres as agricultural land.⁴ The basic criteria the County employed for that initial designation was that a parcel was at least **ten acres** in size and that it was not adjacent to lots of one acre or less on more than fifty percent (50%) perimeter. In addition, the soil characteristics of the designated parcels had to contain prime or unique soils according to the United States Department of Agriculture (**USDA**) and the land had to be primarily devoted to agriculture.⁵

In August 1998, the Washington Supreme Court issued its decision in *City of Redmond vs. Central Puget Sound Growth Management Hearings Board*.⁶ In 2000, partially in response to the *Redmond* decision, the Pierce County Council created an eleven-member Pierce County Farm Advisory Commission (**PCFAC**). The PCFAC was charged with reviewing existing and proposed legislation affecting agriculture and finding ways to maintain, enhance and promote agriculture. Pierce County Code (**PCC**) 2.49.020.

The County's initial 1991-94 agricultural designation criteria basically remained intact until 2003 when the County adopted Ordinance

⁴ CP 16 - AR 66: Exhibits 108, at 2, and 310, at 1.

⁵ CP 16 - AR 66: Exhibit 108, at 2.

⁶ 136 Wn.2d 38, 959 P.2d 1091 (1998), referenced in this brief as "*Redmond I*" but also called "*Benaroya I*" by the Supreme Court in its *Lewis County* case. *Redmond I* was a significant decision since the court ruled that landowner intent was no longer controlling in determining agricultural land use designations.

No. 2003-103s.⁷ That ordinance then became the subject of the Central Puget Sound Growth Management Hearings Board (**the Board**) review in *Orton Farms vs. Pierce County*, a predecessor to this matter.⁸ In that case, the County Council's actions were *not* county-wide but, instead, were limited to portions of two community plans. The County Council lowered the minimum size designation criterion from ten to 2.5 acres.⁹ The Board found that the County's new criteria for identifying and designating agricultural resource lands did not comply with the GMA because the criteria relied primarily on soils data and did not include two of the required components for determining long-term commercial significance – proximity to population areas and possibility of more intensive use. The Board remanded the matter to the County. Subsequently, the County heeded the Board's admonishments and the County's corrective actions were found to comply with the GMA.

Even prior to the Board issuing its *Orton Farms* decision, the County Council had requested that the County's Department of Planning and Land Services (**PALS**) re-evaluate the County's agricultural policies and address their application to other rural areas countywide as part of the

⁷ CP 16 - AR 66: Appendix G.

⁸ Case No. 04-3-0007, Final Decision and Order (August 2, 2004).

⁹ CP 16 - AR 66: Exhibit 11, at 2.

County's 2004 Comprehensive Plan Compliance Review process.¹⁰

In June 2004, the USDA issued its "2002 Census of Agriculture." The 2002 census data indicated that the average size farm in Pierce County is 39 acres and the median size farm is 20 acres.¹¹ Table 8 of the Census also reveals that in 2002 there were 527 one- to nine-acre farms within Pierce County, totaling 2,385 acres [2,385 acres divided by 527 farms equals average farm size of 4.5 acres/farm for this category].¹²

The County Council also adopted Resolution No. R2004-105s¹³ which ordered an economic study of agriculture within the County. On August 31, 2004, the American Farmland Trust presented its report to Pierce County, entitled "The Suitability, Viability, Needs and Economic Future of Pierce County Agriculture."¹⁴ The subtitle of the report is "Phase I Report Responding to Questions Posed by Pierce County Council Resolution R2004-105s" (the **Phase I Report**), which the Board referred to as "truly impressive."¹⁵ It contains several relevant findings:

Large-scale, wholesale oriented, industrial agriculture is not

¹⁰ CP 16 – AR 66: Exhibit 11, at 2; Exhibit 310, at 2; *see also* CP 16 – AR 66: Appendix I (Resolution No. R2003-139s, at 2).

¹¹ CP 16 - AR 2383: Exhibit K ("Findings of Fact") to Ordinance No. 2004-87s, at 4 of 23; *see also* CP 16 – AR 66: Exhibit 87 – attached "Exhibit D;" and CP 16 – AR 52: Index 335, at attached Census – Table 8.

¹² CP 16 - AR 52: Index 335, at 7 of 14, and Table 8 of the Census, at 2.

¹³ Attached to CP 16 - AR 66: "Exhibit A" to Exhibit 87.

¹⁴ CP 16 - AR 66: attachment to Exhibit 87.

¹⁵ *Bonney Lake et al v. Pierce County*, CPSGHMB Case No. 05-3-0016c, Order Finding Compliance and Final Decision, at 20 of 62.

expected to expand significantly in Pierce County. We certainly do have the needed soil types, but we lack the large contiguous parcels of land, the type of food processing and farm support infrastructure, the ability to use industrial farming strategies (aerial spraying, for example) to make such farming viable...

Taking the place of large-scale wholesale agriculture, however, Pierce County is experiencing an influx of small, more intensive, direct-market farming operations that are quite profitable and are likely to sustain themselves over time, especially given some encouragement and protection from the public sector. This transformation is currently incomplete. We still have many farmers struggling, with limited success, to compete at low intensity wholesale agriculture. At the same time, we have numerous examples of farms that have found ways to take advantage of the proximity of their marketplace to avoid the wholesale trap, to greatly increase their per-acre return, to provide values to their customers that are not found in nearby supermarkets, and to use alternative crop selection, crop production, marketing, distribution, and value-added strategies that greatly increase their profitability.¹⁶

...

... large-scale American agriculture is in trouble.

That is why the new strategies and business models listed above have become so important and such an opportunity in Pierce County. For all the advantages of farming in Eastern Washington, farmers there suffer at least one significant disadvantage – lack of nearby access to urban markets. The many successful farmers doing business in Pierce County have one thing in common: They are NOT competing with Eastern Washington and Oregon agriculture. Instead, they are finding ways to take advantage of special opportunities created by their proximity to the urban marketplace. They are capitalizing on increasing consumer awareness and concern about food safety, food quality, and the environment. They are responding to a rising public dissatisfaction with their alienation from the sources of their food. And many of them are making money – sometimes much more money with a

¹⁶ CP 16 - AR 66: attachment to Exhibit 87, at 8 of 21.

lower overall investment (even though their farms are smaller in acreage) than their Eastern Washington counterparts.¹⁷

Throughout the spring and summer of 2004, various permutations of a new agricultural land designation criteria and policies worked their way through the County's planning process. This included hearings before the PCFAC, the Pierce County Planning Commission (the **Planning Commission**) and a County Council committee.¹⁸ The "Pierce County Agriculture Policy Chronology 1994-2004," provides an excellent source for tracing the historic development, as of September 1, 2004, of what would become the new ARL designation.¹⁹ Ultimately, on November 9, 2004, the full County Council elected to adopt the designation criteria contained in what was referred to as "Amendment No. 2"²⁰ when it enacted Pierce County Ordinance No. 2004-87s (the **Ordinance**).²¹ As a result, 29,708 acres of farmland were designated as "Agricultural Resource Lands" (**ARL**).²²

¹⁷ CP 16 - AR 66: attachment to Exhibit 87, at 12 of 21.

¹⁸ See CP 16 - AR 66: various "Staff Reports" and "Staff Memos" – Exhibits 6, 11, 75, 86, 108, 271, 131 and 310.

¹⁹ CP 16 - AR 66: Exhibit 108, at 2-5.

²⁰ Ordinance No. 2004-87s consisted of numerous amendments to the Pierce County Comprehensive Plan, most of which are not at issue in this appeal. Prior to formal adoption, proposals to amend the Comprehensive Plan are given amendment numbers. Therefore, the agricultural designation policies' amendment was referred to as proposed "Amendment No. 2."

²¹ CP 16 - AR 2383 (Pierce County Ordinance No. 2004-87s [**the Ordinance**]): Amendment 2, Exhibit B to the Ordinance, at 6 of 66.

²² CP 16 - AR 66: Exhibit 308, at 2.

Since the adoption of the Ordinance, the County has not stopped in its efforts to protect agricultural lands. In January 2006, the Phase II Report was issued: “Preserving Farmland and Farmers -- Pierce County Agriculture Strategic Plan.” More recently, on October 10, 2006, the Pierce County Council enacted Ordinance No. 2006-52s, which adopts a new chapter of the Pierce County Code, 19B.110, the Graham Community Plan. In addition, the Ordinance added a new section to Chapter 19A.40 PCC.²³ PCC 19A.40.070 created the new “Rural Farms” land use designation within the Rural Element of the Comprehensive Plan. It applies to property greater than one acre:

PCC 19A.40.070 Rural Farm.

RUR Objective 7. Protect agricultural activities on lands that do not qualify as designated Agricultural Resource Lands of long-term commercial significance.

- A. Establish the Rural Farm designation based on current or historic agricultural use including the following factors:
 - 1. The property shall be a minimum of one acre in size.
 - 2. The property is located outside a Rural Center, Reserve 5, Agricultural Resource Land, Designated Forest Land, or Mineral Resource Overlay.
 - 3. The property meets one of the following conditions:
 - a. The property is currently enrolled in the Current Use Assessment Program for Productive Farm and Agriculture; or
 - b. The property owner requests designation as Rural Farm through a Comprehensive Plan amendment process
- B. Increase the agricultural base within the County by

²³ This provision was not appealed and therefore, per Board rulings, is irrefutably valid.

recognizing agricultural properties that may or may not contain prime soils supporting the Agricultural Resource Land designation but are or have been used for agricultural activities.

- C. Provide all the protections to agricultural activities within the Rural Farm which are afforded to those activities in the Agricultural Resource Land designation, as outlined in 19A.30.070, including but not limited to: Right-to-Farm provisions, Current Use Assessment tax incentives, title notification pursuant to Title 18I, Natural Resource Lands, etc.
- D. Allow a range of uses that would be permitted in the Agricultural Resource Land designation or rural residential designations.
- E. Use community planning and comprehensive plan amendment processes to implement or revise the Rural Farm designation as follows:
 - 1. Rural Separator, Rural Sensitive Resource, Rural 10 or Rural 20 designations may be redesignated to Rural Farm pursuant to the criteria outlined in 19A.40.070 A. above.
 - 2. Rural Farm designations may be redesignated to an adjacent rural residential (Rural Separator, Rural Sensitive Resource, Rural 10 or Rural 20) designation provided that the property directly abuts one of these designations and the property is converted to that designation (i.e., a Rural Farm designated property abuts a R10 property and would be changed from Rural Farm to R10).²⁴ Emphasis added.

B. What Agricultural Policies and Designation Criteria Did the County Adopt?

Amendment No. 2 of the Ordinance is entitled “Agricultural

²⁴ Exhibit C to Pierce County Ordinance No. 2006-52s, at 3 of 4. The Court is asked to take official notice of this ordinance.

Policies and Agricultural Resource Lands Designations.”²⁵ An “Agricultural Resource Lands” map depicting these newly designated lands is attached to the Ordinance.²⁶ LU-Ag Objective 16 (codified as PCC 19A.30.070.B) contains the criteria for designating agricultural land:

B. LU-Ag Objective 16. Designate Agricultural Resource Lands (ARL) based on the Growth Management Act definition and the Minimum Guidelines of WAC 365-190-050.

1. Agricultural Resource Lands are lands meeting the definition in RCW 36.70A.030(2): "... land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production."

2. The focus for preservation of agricultural lands must be on lands not already characterized by urban growth, characterized by more intensive rural development, designated Reserve-5 for future urban growth of a city or town, or dedicated to Forest Lands.

a. Only rural lands shall be considered for Agricultural Resource Lands designation.

b. Properties Already characterized by urban growth, characterized by more intensive rural development, designated Reserve-5 for future urban growth of a city or town, shall be excluded, and are defined as follows:

(1) Lands designated Rural Activity Center, Rural Neighborhood Center;

(2) Lands rezoned to Rural Activity Center, Rural Neighborhood Center, Limited Area of More Intensive Rural Development (LAMIRD), or Reserve-5 in the adoption of a community plan or associated Comprehensive Plan Amendment;

(3) Lands that are part of a preliminary plat approved prior

²⁵ CP 16 - AR 2383: Exhibit B to the Ordinance, at 6-12 of 66.

²⁶ CP 16 - AR 2383: Exhibit B to the Ordinance, at 55 of 66.

to February 1, 2005 or a final plat recorded prior to February 1, 2005, including any associated open space or other non-buildable tracts identified on the face of the plat; and

(4) Lands with mobile home parks.

c. Designated Forest Lands shall be excluded.

3. Designation of Agricultural lands of "long-term commercial significance" requires consideration of growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas and the possibility of more intense uses of the land (RCW 36.70A.030(10)). WAC 365-190-050 prescribes the minimum guidelines for identifying agricultural lands of long-term commercial significance and said minimum guidelines shall be considered in designating land as Agricultural Resource Land, including the following:

a. Soils. The key criterion for defining Agricultural Resource Lands is the presence of the County's most productive agricultural soil types and their associated production yield: soils identified as "Prime Farmland" in the NRCS Field Office Technical Guide for Pierce County, Section 2., distributed February 24, 2003, which have a grass/legume production yield of 3.5 tons per acre or greater, as identified by the U.S. Department of Agriculture, Natural Resources Conservation Service soil classification system.

(1) Minimum parcel size. The threshold size used as a basis for the designation of Agricultural Resource Lands is 5 acres or larger in size because soils data is most reliable at this size. Options for including parcels below the 5-acre threshold are provided in community planning processes, see 19A.30.070 C. or the Comprehensive Plan Amendment process.

(2) Portion affected. The identified soil types and yield must be found on 50 percent or more of the parcel area, PROVIDED that for properties abutting the Carbon, Puyallup, or White River, the threshold shall be 25 percent or more of the parcel area. The designation would affect the whole parcel, not just the portion containing the soil types and yield. Options for including parcels not meeting this criteria are provided in community planning processes, see

19A.30.070 C., or the Comprehensive Plan Amendment process.

b. Intensity of Nearby Uses. To address the intensity of nearby uses, parcels that are adjacent to lots of record of one acre or less on more than 50 percent of the perimeter of the parcel shall not be designated Agricultural Resource Lands.

c. Pressures to Urbanize. Community planning and joint planning efforts may be used to define and establish an appropriate buffer of Reserve-5 around the urban growth area of a city or town. In determining whether a Reserve-5 buffer should be established, the following criteria shall be considered:

(1) Proximity to Urban Growth Area. A buffer of a reasonable width of Reserve-5 designation adjacent to the city/town urban growth boundary, following property lines, may be proposed in a community plan or joint planning agreement. Such a proposal must be accompanied by findings that support the designation and width of the buffer consistent with the Growth Management Act, the County-Wide Planning Policies and the Comprehensive Plan. Once established, the buffer shall not be expanded except through the Compliance review required by RCW 36.70A.130. Designation shall be accompanied by implementing regulations which address setbacks and other zoning techniques used to protect adjacent agriculture activities.

(2) Economic Viability and Environmental Impacts of Farming. In the community plan/joint planning evaluation of a potential buffer of Reserve-5 adjacent to a city or town pursuant to (1) above, economic viability and environmental impacts of farming may be considered as additional factors for inclusion of specific parcels in the Reserve-5 buffer. However, economic viability or environmental impacts of farming shall not be the only determining factors for re-designation.

(3) Other Criteria. In establishing a Reserve-5 buffer, and notwithstanding any other provisions of 19A.30.070 B., a community planning board or parties to a joint planning effort shall consider all of the criteria prescribed in WAC 365-190-050 and shall document such consideration in its recommendation to the County Council.

d. Landowner intent. While landowner intent cannot be used as a rationale for dedesignation, it can be used as a criterion for inclusion when reflected by the tax status of the land (inclusion in the County's Current Use Assessment program as agriculture).²⁷

In addition, LU-Ag Objective 17 (codified at PCC 19A.30.070.C) contains criteria for allowing parcels of property less than five acres in size to nonetheless be designated as ARL.²⁸

C. What Was the County's Rational for Adopting Amendment No. 2?

As a result of *Orton Farms*, the County conducted the required appropriate analysis and provided its rationale (“articulated” the basis²⁹) for its 2004 designation criteria. That articulated rationale was provided in the Phase I Report,³⁰ numerous PALS staff reports³¹ and environmental documents.³² In addition, the County “showed its work” in a series of mathematical calculations.³³ However, most importantly, the County Council articulated the basis of its designation criteria when it adopted an extensive set of specific written findings regarding Amendment No. 2.³⁴

²⁷ CP 16, AR 2383: Exhibit B to the Ordinance, at 7-8 of 66.

²⁸ See CP 16 - AR 2383: Exhibit B to the Ordinance, at 9 of 66.

²⁹ See *Orton Farms*, at 28.

³⁰ CP 16 – AR 66: Exhibit 87.

³¹ See CP 16 - AR 66: Exhibits 6, 11, 75, 86, 108, 271, and 310

³² See CP 16 - AR 66: Exhibits 15 and 131.

³³ See CP 16 - AR 66: Exhibit 308, at 2 of 2.

³⁴ See CP 16 - AR 2383: Exhibit K to the Ordinance.

These findings provide a narrative explanation of the County's ARL designation process. In relevant part, the County Council's findings provide:

Amendment No. 2 Finding. The Pierce County Council finds that Amendment No. 2, to update the Agriculture policies by re-defining Agricultural Resource Lands, establishing designation and de-designation criteria, providing for a community planning role, identifying programs and policies to support and enhance agriculture, and providing policies for uses allowed, appropriate densities, and related regulations, should be approved because:

1. **Minimum Guidelines.** The criteria for designating Agricultural Resource Lands is derived from and consistent with the State's Growth Management Act in RCW 36.70A.030(2) and .050 and the Minimum Guidelines in WAC 365-190-050:

Proximity to population areas and possibility of more intensive use have been evaluated in the County's process of designating agricultural lands. To address the possibility of more intensive uses the following land uses are proposed to be excluded from the Agricultural Resource Lands (ARL) designation:

- Lands that are designated Rural Activity Center or Rural Neighborhood Center;
- Lands that are rezoned to a Rural Center classification through adoption of a community plan;
- Lands that are part of a preliminary plat approved prior to February 1, 2005;
- Lands that are part of a final plat recorded prior to February 1, 2005 including any associated open space or non buildable tracts identified on the face of the plat;
- Lands with mobile home parks;
- Lands designated Reserve-5 through approval of a community plan or a Comprehensive Plan Amendment recommended by a joint planning process.

To address proximity to population areas, the following land uses are proposed to be excluded from the Agricultural Resource Lands designation:

- Lands adjacent to lots of record of one acre or less on more than 50 percent of the perimeter of the parcel;

In addition, designated Forest Lands are proposed to be excluded.

The availability of public facilities and services: Rural and resource areas have not been planned to receive urban facilities and services. Some limited public services, such as police and fire protection, are planned to service these areas. Since the ARL designation is located outside of urban growth boundaries, there is no planned urban infrastructure or urban services other than the basic fire and police for these lands.

Tax status: Properties currently in the Agriculture designation typically enjoy a beneficial tax status due to the use of the property for agriculture. In terms of acreage, approximately 38 percent of the ARL area is being assessed as open space or farm and agriculture in the County's Current Use Assessment program and receiving property tax reductions. Because approximately 11,500 acres of the total 31,000 acres being proposed for the ARL designation are receiving property tax reductions based on the Current Use Open Space taxation classification. The County finds that owners of lands in the Current Use Assessment program demonstrate their commitment to agriculture for the long term because participation in the taxation program requires that the difference between market value and current use value be repaid for a specified term of years if the owner chooses to remove the property from the program.

Relationship or proximity to urban growth areas: Lands that meet the criteria for the ARL designation are distributed broadly across rural areas of the County. The Proposal would not allow designated agricultural lands to be added directly to an urban growth area. The GMA does not allow agricultural lands within a UGA unless a County or City has a development rights transfer program according to RCW 36.70A.060(4). The Proposal provides the opportunity for community planning and joint planning efforts with cities and towns to re-evaluate ARL designated lands that are in close proximity to urban growth areas and consider designating a buffer of Reserve lands designation for the individual city or town. The Council finds that the County has established a Reserve area to the south and east of the County's Urban Growth Area, and Gig Harbor has a Reserve area, but other satellite cities and towns have not established a future expansion area for their UGA's. Some

satellite cities, such as Orting and Buckley, have no lands in a UGA at all. The Council finds that the opportunity for these cities and towns to establish such an area should be preserved. And, since these cities and towns expect growth pressures to continue the adjacent lands will be affected by these pressures.

Predominant parcel size: The predominant parcel size for the ARL designation is between 5 and 30 acres. Approximately 88 percent ARL parcels are less than 30 acres in size. According to the USDA Census of Agriculture, average farm size in Pierce County has varied over the past few Censuses. The 2002 County data indicates that the average size farm is 39 acres and the median size farm is 20 acres. The number of farms has gone down 9 percent and the number of acres in farmland has gone down 7 percent since the 1997 Census.

The Proposal provides a base density of one dwelling unit per ten acres for the ARL designation. A base density of one unit per ten acres would help to maintain the long term commercial significance of these lands by ensuring lands are of a size suitable for farming.

Land use settlement patterns and their compatibility with agricultural practices: The predominant settlement pattern is single-family units on parcels ranging from 5 to approximately 30 acres in size. Rural residential development patterns are considered compatible to agricultural uses. The proposed amendment specifically excludes parcels less than five acres in size, identified commercial uses and commercially zoned properties, approved plats, mobile home parks, and properties within the Forest Land designation from inclusion in the ARL designation.

Council recognizes that agricultural activities can occur on various parcel sizes and soil types. The proposal provides for options that can be considered through a community planning process to include parcels that may not be five acres in size or meet the soil classification criteria.

Intensity of nearby land uses, and History of land development permits issued nearby: Incompatible and more intense land uses in the rural area are proposed to be excluded from the ARL

designation. More intensive land use development in the rural area is limited in scale and scope by the Comprehensive Plan and implementing regulations, so would have little effect on neighboring agricultural lands. Urban land along the peripheries of the Urban Growth Area contain mostly residential properties at urban levels of intensity. The prime agricultural soils located in the Alderton-McMillin area are buffered from the UGA to the west by a significant change in topography, represented by a ridge, and therefore are not affected by the more intense uses inside the UGA. More intense uses along other urban growth boundaries can impact the neighboring rural agricultural lands. Areas where this has the most potential include areas adjacent to the corporate limits of cities and towns. Some of these cities and towns have no urban growth area and limited areas for urban expansion inside the corporate limits. The proposal includes provisions for these cities and towns to work with the County, through a community plan or joint planning process, to identify an area adjacent to their boundaries for potential future urban growth. This buffer area would be considered for reclassification to the land use designation of Reserve-5. A Reserve-5 area would provide a buffer between the intense urban uses of the municipality and the agricultural lands, addressing incompatibility issues, pressures to urbanize and effects on land values as well.

Outside of the Rural Centers and other limited areas of more intensive development in the rural area, uses are limited to low-density residential and resource-related uses, all determined to be compatible with agricultural lands. The presence of critical areas will also limit the possibility of more intensive use of the land. Some of the proposed ARL lands are in volcanic, seismic, and liquefaction hazard areas, an aquifer recharge area, and are within vicinity of the Puyallup River's 100 year floodplain. These soil characteristics do not favor urban residential densities. The presence of these critical areas combined with the unique soil characteristics is not favorable for intense urban development.

Current regulations do not permit residential densities that would lead to incompatibility issues for surrounding agricultural activities. Proposed amendment #1 to this 2004 Update provides for notice requirements to be placed on properties within 500 feet of ARL designated lands. The notice would disclose potential

incompatibilities between agricultural uses and other uses. The County has also adopted local Right to Farm Protections (Chapter 18I.35 PCC) provisions that will implement additional notice to properties within 2,500 feet of agricultural operations. Notice requirements that aim to reduce incompatibility issues with agriculture activities will maintain the long term commercial significance of these lands.

Land values under alternative uses: Land values vary according to the types of uses that exist or are allowed on a property. The majority of the land uses considered for the ARL designation are primarily residential or open space uses. As described in the Tax Status consideration, properties classified as open space will receive a property tax reduction from the current use of the property which is most likely a residential use. Properties that are not being taxed as open space will continue to be taxed at the current levels. ARL designated properties will most likely continue to be valued at a commensurate rate similar to surrounding rural properties, except in the case of lands that are in close proximity to urban growth areas where land values would most likely be higher.

The Proposal includes provisions for ARL designated lands to allow for commercial uses associated with agriculture, residential uses, and churches integrated with agriculture. These provisions are anticipated to increase the land value of ARL designated lands, thereby bringing their value closer to the value associated with alternative uses. By allowing additional activities related to agriculture on site, these lands have more long term commercial significance. The intent is that by providing farmers with expanded opportunities to market their products and add other agriculture-related commercial activities, their economic plight will be improved so that the pressures to sell and convert to other uses will be reduced. It is the intent of the Council that in addition to preserving the valuable farm land itself these policies also help to preserve the activity of farming, support the property rights of farmers, and enhance the regional economy.

Proximity of markets: Because the proposed ARL designated lands would be distributed throughout Pierce County, these lands lie within close proximity to both rural and urban markets in the County. According to the 2002 USDA Census of Agriculture,

despite the decreases in Pierce County farmland and the total number of farms, the market value of production (crop sales and livestock sales) has gone up by 23 percent since the 1997 Census.

The County recently received a report entitled "The Suitability, Viability, Needs, and Economic Future of Pierce County Agriculture." {CP 16 – AR 66:Exhibit 87}. This report was compiled by American Farmland Trust personnel (AFT) with the cooperation and assistance of Pierce County Economic Development, PALS, the Pierce County Farm Advisory Commission, WSU Research Extension-Puyallup and the Small Farms Program, the Puyallup NRCS Field Office, Pierce Conservation District as well as individual farmers, agriculture specialists, and other agricultural organizations.

The Council finds that continued study and analysis is needed to examine the agricultural economy and develop proposals for improving the viability of the local agriculture market. The proposal provides guidance and direction for improving the economic viability of farming and determining the future markets for the County.

2. **Soils.** Determining the appropriate soil type and yield for designating prime agricultural soils involved discussions of Pierce County Planning and Land Services (PALS) with Chuck Natsuhara, a Resource Soil Scientist for the USDA Natural Resources Conservation Service responsible for interpreting local soil classifications and publishing the data in soil survey reports. {See CP 16 – AR 66: Exhibits 162, 164, 166 and 451}. RCW 36.70A.050 identifies the Washington State Department of Agriculture as the appropriate agency to seek consultation regarding the classification of agricultural lands. However, the State Department of Agriculture does not provide a technical service for soils data; its focus is marketing, food safety, pesticide management and agricultural statistics. Mr. Natsuhara assisted PALS by sorting the data contained in the Pierce County Area Soil Survey. He explained the method for classifying soils based on land capability classes (LCC). The Natural Resource Conservation Service (NRCS) uses LCC as a planning tool in laying out conservation measures and practices on farms so as to farm the land without serious deterioration from erosion or other causes.

The current LCC includes eight classes of land, identified as numerals I-VIII. The criteria for placing a given area in a particular class involve the landscape, location, slope, depth, texture, and reaction of the soil. The first four classes are arable land, suitable cropland, in which the limitations on their use and necessity of conservation measures and careful management increase from I through IV. The remaining four classes (V-VIII) are not to be used for cropland, but may have uses for pasture, range, woodland, grazing, wildlife, recreation, and aesthetic purposes. Within the eight broad classes are subclasses which signify special limitations such as erosion, excess wetness, rooting zone problems, and climatic limitations. Within the subclasses are capability units which give some prediction of expected agricultural yields and indicate treatment needs.

The Pierce County Area Soil Survey identifies the classes and subclasses of soils that are to be considered important farmland. When analyzing these classes of soils countywide, they were found to exist on approximately 74,000 acres of unincorporated Pierce County excluding urban growth areas, the Puget Sound, designated Forest Lands, and military lands. Mr. Natsuhara pointed out that some of these soil classes were not suitable for crop production and suggested using an analysis of crop production yield to determine the most suitable soils for agricultural production in Pierce County. A yield in tons of grass-legume hay is used because it is the one crop that provides reliable yield estimates for all the map units in the County.

3. **Criteria for Designation – Methodology.** When using geographic criteria in policy or regulation, the County has traditionally used 50 percent or greater parcel coverage ratios to designate or regulate land uses. For Agricultural Resource Lands, the County lowered the parcel coverage to 25 percent in the case of lands that abut the Carbon, Puyallup, or White Rivers where parcel acreages were skewed due to the presence of glacial outwash areas and in some cases the riverbed itself. The portions of the parcels that were suitable for crop production met the soil criteria.

The County also chose to consider parcels that are five acres or larger in size based on the purity of map units explained in the Soil Survey Manual. Due to the minimum delineation size by map

scale, soil class is more accurately determined using a scale 1:24,000 (approximately five acres).

Initially, PALS included lands that are currently zoned Agriculture as a criteria for agricultural resource land inclusion. Although some of these lands may not have met the soil criteria, PALS recognized these lands as "devoted to agriculture" and, therefore, of long term commercial significance since. At the Council level of review, PALS was requested to re-evaluate those currently zoned Agriculture parcels against the proposed criteria. This was done, both for the sake of consistency, so that all designated lands met the same criteria, and because certain analysis was not provided in 1994, when the lands were originally designated. Approximately 13,000 of the 17,500 acres of currently zoned Agriculture lands did not contain the soil composition as described in the criteria. The proposal includes options for including parcels that may not meet the criteria, but do contain viable agricultural operations, through Comprehensive Plan Amendments or community planning processes.

The County's goal was to designate the most suitable lands for crop production and that had the best opportunity for long term commercial significance. By recognizing and excluding areas or uses that may lead to incompatibility with agricultural uses and recognizing and including areas and uses that are compatible with agricultural uses, the County would better meet the GMA's planning goal. The Council recognizes that some criteria, such as economic viability and environmental constraints, cannot be used alone to de-designate parcels from the ARL designation, but felt that these criteria were important enough to identify in the Comprehensive Plan for future analysis and consideration, along with the other criteria.

The County excludes parcels that meet the soil criteria, but are 1) encroached by suburban densities (one-acre lot sizes) on more than 50 percent of the perimeter of the parcel, 2) already designated or designated in the future by a community plan for commercial growth, 3) are part of an approved plat and planned for residential uses, 4) are open space tracts associated with recorded plats, 5) built with mobile home parks, 6) designated as Reserve-5 through a community plan or joint planning process, or 7) designated Forest

Lands. These lands were found to be incompatible with agricultural uses due to their intensity or possible incompatibility with agricultural activities.

After applying all of the proposed criteria, the ARL designation would be applied to approximately 31,000 acres.³⁵

...

7. Additional Findings. In addition, the Pierce County Council finds that:

- The Proposal furthers the goals and objectives of RCW 36.70A.020(8), 050, 060, and 177.
- The Proposal is consistent with and would further the Agriculture policies identified in the County-Wide Planning Policies;
- The Proposal furthers several objectives of the Comprehensive Plan, including LUAg Objectives 17, 19, 20, and 21;
- The Proposal is consistent with GMA, at RCW 36.70A.050, which addresses minimum guidelines that local jurisdictions must consider when identifying agricultural lands;
- The Proposal recognizes the County's agricultural resource lands by one land use designation, Agricultural Resource Lands (ARL), which emphasizes a distinction for the Alderton-McMillin community plan area and the Riverside portion of the Mid-County communities plan area as being areas with valuable agricultural soils with a special emphasis in compensatory programs;
- The Proposal increases the base and maximum density to one dwelling unit per ten acres;
- The Proposal includes a process to analyze contiguous parcel ownership, parcel size that is below the five acre threshold, parcels that may not contain the soil type and/or yield, and tax status for inclusion in the ARL designation;
- The Proposal includes a process to use community planning and joint planning agreements to make limited refinements to the ARL designation that are consistent with the minimum guidelines;
- The Proposal enhances the preservation of agricultural land, thereby improving the viability of agriculture in Pierce County;
- The Proposal addresses the need for additional permitted uses that are related to agriculture to improve the commercial viability of

³⁵ CP 16 – AR 66: Exhibit 308 indicates that in the final analysis, 29,708 acres were designated.

agriculture and the long term commercial significance of designated agricultural lands;

- The Proposal designates lands in the County primarily based on soil types that are capable of agriculture production;
- The proposal prohibits or limits certain uses that may be incompatible to agricultural operations;
- The Proposal includes soil criteria that includes growing capacity, productivity, and soil composition of the land for long-term commercial production; and
- The Proposal considers the land's proximity to population areas and the possibility of more intense use of the land.
- The Council intends to consider re-authorizing the \$5.00 Conservation District Assessment approved in 2003 with a new higher emphasis on purchase of development rights for agriculture activities as a means to implement some of the policies included in the Agriculture policies being adopted herein...³⁶

D. What Are the Growth Management Act's Requirements for Designating Agricultural Land?

RCW 36.70A.020 lists thirteen of the GMA's fourteen planning goals.³⁷ The introductory paragraph to that section and subsection (8) state:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

...
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation

³⁶ CP 16 - AR 2383: Exhibit K to the Ordinance, at 3-10 of 23.

³⁷ The GMA's fourteenth planning goal is found at RCW 36.70A.480.

of productive forest lands and productive agricultural lands, and discourage incompatible uses. Emphasis added.

Fairly recently, the Washington Supreme Court has commented upon the nature of the goals and pointed out that they merely provide “guidance.”³⁸

The *Lewis County* court further noted that when there is a conflict between the “general” planning goals and more specific requirements of the GMA, “the specific requirements control.”³⁹

There are four GMA sections that more directly address agricultural lands than the goal provision. The first of the four, RCW 36.70A.030, contains relevant definitions:

i. RCW 36.70A.030

RCW 36.70A.030(2) defines “agricultural land” as:

... land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has *long-term commercial significance* for agricultural production. Italics added.

In turn, RCW 36.70A.030(10) defines “long-term commercial significance” as including:

... the growing capacity, productivity, and soil composition of the

³⁸ *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 503-504, 141 P.3d 1 (2006), at footnote 12.

³⁹ *Lewis County*, at 503, footnote 12, quoting *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, 119 Wn. App. 562, 575, 81 P.3d 918 (2003).

land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.

ii. RCW 36.70A.170

RCW 36.70A.170, entitled “Natural resource lands and critical areas – Designations,” contains an actual requirement, which controls over the Act’s general goals. RCW 36.70A.170 provides in relevant part:

- (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
 - (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
- ...
- (2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050. Emphasis added.

iii. RCW 36.70A.050

RCW 36.70A.050, cited directly above, is captioned, “Guidelines to classify agriculture, forest, and mineral lands and critical areas.” The statute states in relevant part:

- (1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

...

(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170. Emphasis added.

iv. RCW 36.70A.060

RCW 36.70A.060 is entitled “Natural resource lands and critical areas -- Development regulations.” Subsection (1) involves what were commonly referred to as “*interim* development regulations” that had to be adopted prior to counties and cities adopting their first comprehensive plans under the GMA and the development regulations that implement those comprehensive plans. In addition, Subsection (4), although it would have probably best been codified as a subsection of RCW 36.70A.170, places permanent restraints on designating agricultural lands within an urban growth area. The statute states in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt [interim] development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and **shall remain in effect until** the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural

products, or timber, or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

...

(3) Such counties and cities shall review these [interim] designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights. Emphasis added.

II. SUMMARY OF ARGUMENT

The Central Puget Sound Hearings Board and the Thurston County Superior Court reached the proper conclusions when they each affirmed the County's adoption of Ordinance No. 2004-87s. Amendment No. 2 to Pierce County's 2004 Comprehensive Plan complies with the GMA's requirements for designating agricultural lands. The County not only considered but applied the Minimum Guidelines administrative

regulations. Furthermore, the minimum five-acre parcel designation criterion is within the County's broad discretion to utilize, and it acknowledges the unique local circumstances within Pierce County.

III. ARGUMENT

Amendment No. 2 encourages the conservation of productive agricultural lands and discourages incompatible uses consistent with the GMA's natural resource industry goal and its more specific agricultural land requirements. Approximately 30,000 acres of land have been designated ARL by Amendment 2.⁴⁰ The implementing development regulations that the County has adopted to preserve these lands are designed to "support and enhance" farming.⁴¹

When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.⁴²

Pierce County has met this conservation mandate:

A. The County Has Complied with RCW 36.70A.020(8).

As previously discussed, the GMA's goals serve to guide cities and counties. Pierce County has taken that guidance: Amendment 2 conserves

⁴⁰ CP 16 - AR 66: Exhibit 308, at 2.

⁴¹ See CP 16 - AR 2383: Exhibit B to the Ordinance, at 9-10 of 66; codified as PCC 19A.30.070 E and F.

⁴² *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562, 14 P.3d 133 (2000).

productive agricultural lands and discourages incompatible uses.

B. The County Has Complied with RCW 36.70A.170 and .060.

In 1991 Pierce County designated agricultural lands not already characterized by urban growth that have long-term commercial significance by considering the guidelines established pursuant to RCW 36.70A.050. Furthermore, the County adopted development regulations to assure the conservation of these designated agricultural lands at the same time.

C. The County Has Considered the Minimum Guidelines.

RCW 36.70A.170(2) requires that counties “consider” the guidelines established by RCW 36.70.050. On March 15, 1991, the Washington State Department of Community, Trade and Economic Development (**CTED**) issued Chapter 365-190 WAC, "Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas" (the **Minimum Guidelines**). They became effective on April 15, 1991. WAC 365-190-050, “Agricultural lands,” is the pertinent provision in the Minimum Guidelines related to agriculture. It provides in part:

(1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture

into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to department of community development.

“Consideration” of these guidelines, however, does not make them binding. The Board has consistently ruled that the Minimum Guidelines are not mandatory and local governments are not required to comply with them.⁴³ In *Orton Farms*, the Board reviewed its holdings about the

⁴³ *Master Builders Association of King and Snohomish Counties v. City of Arlington*, CPSGMHB Case No. 04-3-0001, Final Decision and Order (2004), at 25, citing *Twin Falls*, Final Decision and Order, (Sept. 7, 1993) at 21. See also *Lawrence Michael Investments, L.L.C., Chevron USA, and Chevron Land and Development Company v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (1999), at 38, quoting from *Tracy v. Mercer Island*, (*Tracy*) CPSGPHB Case No. 92-3-0001, Final Decision and Order (Jan. 5, 1993), at 23.

Minimum Guidelines:

The Board has stated that the minimum guidelines are advisory and not mandatory. In one of its earliest cases, the Board stated, "The minimum guidelines (Chapter 365-190 WAC) remain advisory -- the legislature has not given [CTED] the authority to adopt mandatory regulations." The Board notes that over the ensuing decade, the legislature still has not seen fit to authorize CTED to adopt the "minimum guidelines" as mandatory regulations. Consequently, the County is not compelled to rely upon or apply the CTED indicators noted in WAC 365-190-050(1)(a through j) in its designation process.⁴⁴

D. The County Has Applied the Minimum Guidelines.

Despite the fact that the Minimum Guidelines are purely advisory, the County has not only procedurally considered them but substantively applied them. In doing so, the County heeded an observation made "with interest" by the Board about its past experience in cases dealing with the Minimum Guidelines.⁴⁵ An examination of Amendment No. 2⁴⁶ and the Findings of Fact regarding Amendment No. 2⁴⁷ (both quoted above) repeatedly reveal that the County considered the Minimum Guidelines. In doing so, Pierce County utilized the GMA's definitions of "agricultural

⁴⁴ *Orton Farms v. Pierce County* CPSGMHB Case No. 04-3-0007c, Final Decision and Order (2004) at 55-56. Internal citations omitted.

⁴⁵ The Board pointed out that, in its experience "... each instance where agricultural lands designations or de-designations have been challenged before the Board, the challenged jurisdiction has either explicitly adopted by reference WAC 365-190-050(1) into its Plan, or explicitly applied WAC 365-190-050(1) in its analysis and findings supporting the decision. *Orton Farms*, footnote 19, at 26.

⁴⁶ CP 16 – AR 2383: Exhibit B to the Ordinance, at 7-8 of 66.

lands” and “long-term commercial significance.”

In reviewing these two statutory definitions, the Board has determined that identifying and designating agricultural resource lands is a two-step process. The first requirement is that the land must be “devoted to” agricultural usage; the second step is that the land must have “long-term commercial significance.”⁴⁸

i. Primarily Devoted to Commercial Production

The first prong is to determine whether land is primarily devoted to commercial agricultural production. Although landowner intent and current use of a particular parcel of property can be considered, they cannot be conclusive for purposes of determining whether land is “primarily devoted” to commercial production.⁴⁹ Instead, land is primarily devoted to agricultural use “[I]f it is in an area where the land is actually used or capable of being used for agricultural production.”⁵⁰ The Board in *Orton Farms* discussed the first prong in more detail:

Regarding the test’s first prong, the *Redmond* Court clarified that land is devoted to agricultural use “[I]f it is in an area where the land is *actually used or capable of being used* for agricultural

⁴⁷ CP 16 – AR 2383: Exhibit K to the Ordinance, at 3 of 23.

⁴⁸ *Orton Farms*, at 24; citing *Grubb v. Redmond*, CPSGMHB Case No. 00-3-0004, Final Decision and Order (August 10, 2000), at 11 and *Hensley v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Final Decision and Order (September 22, 2003), at 36.

⁴⁹ *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

⁵⁰ *Redmond*, at 53.

production.” *Redmond*, at 53, (emphasis supplied). This component of the test [i.e., “devoted to”] is derived from USDA, SCS and NRCS soil surveys, land capability and soil classifications maps. It is important to acknowledge that these maps are large scale and particularly useful in identifying soils on a county-wide or area-wide basis, but the delineation of soil types noted on these maps may vary from site-specific soil assessments for a given parcel. However, they meet the GMA requirement and are appropriate for use by a jurisdiction in meeting its designation obligations pursuant to the Act. Thus, soils data plays a significant role in the identification and designation of agricultural resource lands.⁵¹ Emphasis added.

This *Orton Farms* quotation, coupled with the introductory paragraph of WAC 365-190-050, reveals that a soils analysis is the main component for determining the “primarily devoted” prong. The County utilized the USDA’s soil surveys and maps. Amendment No. 2 contains the requisite soils requirements.⁵²

a. Soils. The key criterion for defining Agricultural Resource Lands is the presence of the County's most productive agricultural soil types and their associated production yield: soils identified as "Prime Farmland" in the NRCS Field Office Technical Guide for Pierce County, Section 2., distributed February 24, 2003 , which have a grass/legume production yield of 3.5 tons per acre or greater, as identified by the U.S. Department of Agriculture, Natural Resources Conservation Service soil classification system. (1) Minimum parcel size. The threshold size used as a basis for the designation of Agricultural Resource Lands is 5 acres or larger in size because soils data is most reliable at this size. Options for including parcels below the 5-acre threshold are provided in community planning processes, see 19A.30.070 C. or the

⁵¹ *Orton Farms*, at 25.

⁵² See CP 16 – AR 2383: Exhibit B to the Ordinance, at 7-8 of 66; codified as PCC 19A.30.070 B.3.

Comprehensive Plan Amendment process.

(2) Portion affected. The identified soil types and yield must be found on 50 percent or more of the parcel area, PROVIDED that for properties abutting the Carbon, Puyallup, or White River, the threshold shall be 25 percent or more of the parcel area. The designation would affect the whole parcel, not just the portion containing the soil types and yield. Options for including parcels not meeting this criteria are provided in community planning processes, see 19A.30.070 C., or the Comprehensive Plan Amendment process.⁵³

Amendment No. 2 utilizes soils identified as “prime farmland.”⁵⁴ “Prime farmland” is defined as “the best.”⁵⁵ The County relied upon the advice of an expert from the USDA’s Natural Resources Conservation Service (NRCS), Chuck Natsuhara, to determine which soils to use in designating the County’s ARL. He is a soil scientist very familiar with Pierce County soils.

...Mr. Natsuhara pointed out that some of these soil classes were not suitable for crop production and suggested using an analysis of crop production yield to determine the most suitable soils for agricultural production in Pierce County. A yield in tons of grass-legume hay is used because it is the one crop that provides reliable yield estimates for all the map units in the County.⁵⁶

The NRCS-produced Table B2 lists the “grass-legume hay” yields per acre measured in tons. The tonnage production ranges from 1.5 to 6.0

⁵³ CP 16 – AR 2383: Exhibit B to the Ordinance, at 7-8 of 66; codified as PCC 19A.30.070 B.3.

⁵⁴ CP 16 – AR 2383: Exhibit B to the Ordinance, at 7 of 66; codified as PCC 19A.30.070 B.3.a.

⁵⁵ See CP 16 – AR 66: Exhibit 166, NRCS attachment, at 17 of 19.

⁵⁶ CP 16 – AR 2383: Exhibit K of the Ordinance, at 7 of 23.

depending on the soil type.⁵⁷ Based on Mr. Natsuhara's advice,⁵⁸ Pierce County used a soils criterion of soils identified as "prime farmland" which also have a grass/legume production yield of 3.5 tons per acre or greater.⁵⁹ It was well within the County's discretion to apply that standard.

The Board agreed and concluded that:

Neither the Act nor CTED's guidelines require or prohibit inclusion of a yield factor in designating ARLs. Establishing a criterion based upon the grass/legume yield of 3.5 tons per acre limitation is within the County's discretion.⁶⁰

The Board has also indicated:

USDA, SCS⁶¹ and NRCS soils information establishes and defines the 'potential universe' of lands that could be designated as agricultural resource lands.⁶²

An even more detailed soils analysis and discussion is contained in the Ordinance's Findings of Fact.⁶³ As the last paragraph of Section 2 ("Soils") of the agricultural lands Findings indicates, the "potential

⁵⁷ CP 16 – AR 66: Table B2 attached to Exhibit 166.

⁵⁸ See CP 16 – AR 66: Exhibits 162, 164, 166 and 451.

⁵⁹ CP 16 – AR 2383: Exhibit B to the Ordinance, at 7 of 66; codified as PCC 19A.30.070 B.3.a. Note also that thirty-four (34) types of soil are considered "prime farmland" in Pierce County. Of those soils, only six are considered "prime" without any condition. For the remaining twenty-eight (28) types of soil, they are only "prime" if specified conditions are met, for instance: "if irrigated," "if drained," "if protected from flooding" or "if not frequently flooded during the growing season." CP 16 – AR 66: Exhibits 166 and 451, attached Table Y.

⁶⁰ *Bonney Lake*, at 19 of 62.

⁶¹ The Soil Conservation Service (SCS) has been renamed to the Natural Resources Conservation Survey (NRCS).

⁶² *Orton Farms*, at 25.

⁶³ CP 16 – AR 2383: Exhibit K to the Ordinance, at 3-11 of 23.

universe” of agricultural land in unincorporated Pierce County was approximately 74,000 acres.⁶⁴ All these acres were not designated, however, as to do so would ignore the second-prong of the designation process.

ii. Long-term Commercial Significance for Agricultural Production

Designating agricultural lands is a two-step process. The County could not designate all 74,000 *potential* acres of agricultural land. Instead, in addition to the “primarily devoted” prong, the County also had to apply the “long-term commercial significance” (LTCS) prong of the test, as, “to be guided strictly by the physical nature of the land would stifle economic development...”⁶⁵

Thus, counties must do more than simply catalogue lands that are physically suited to farming. They must consider development prospects (the "possibility of more intense uses") in determining if land has the enduring commercial quality needed to fit the agricultural land definition.⁶⁶

The Act’s definition of LTCS can be broken down into five sub-parts:

- growing capacity, {soil}
- productivity, {soil}

⁶⁴ CP 16 – AR 2383: Exhibit K to the Ordinance, at 7 of 23; *see also* CP 16 – AR 66: Exhibit 308, at 2.

⁶⁵ *Lewis County*, at 499.

⁶⁶ *Lewis County*, at 500-501.

- soil composition {soil}
- proximity to population areas, and {location}
- possibility of more intense uses of the land. {location}

The first three components of the definition of LTCS “weigh heavily” in the soils arena.⁶⁷ However, the Board has held that:

... the Act’s definition of LTCS requires two other factors to be considered: 1) the land’s proximity to population areas and 2) the possibility of more intense use of the land. These two factors are principally locational factors requiring that the intrinsic attributes of the land be evaluated in the context of the land’s location and surroundings. Application of these two factors will likely cull the size of the potential agriculture resource land universe derived solely from soil information, and yield fewer acres as appropriate for designation as agricultural resource land of long-term commercial significance.⁶⁸ Emphasis added.

The Supreme Court has held that counties may consider the ten “development-related factors” contained in Subsection (1) of WAC 365-190-050.⁶⁹

These factors, in addition to the statutory factors offer ready guidance in determining if land has ‘long-term significance’ for agricultural production.⁷⁰

In other words, the ten factors listed in WAC 365-190-050(1)(a) thru (j) are a way to consider “the combined effects of proximity to population areas and the possibility of more intense uses of the land.” The Supreme

⁶⁷ See *Orton Farms*, at 25.

⁶⁸ *Orton Farms*, at 25-26.

⁶⁹ *Lewis County*, at 502.

⁷⁰ *Redmond*, at 55.

Court has also pointed out that these ten factors are not prioritized.⁷¹

Ironically, given all the discussion about them, the Minimum Guidelines do not specify *how* these factors should be analyzed and *how much weight* to give to any one of them. For instance, one factor is the relationship or proximity of the land to an urban growth area. CTED does not advise one way or the other what to do about the analysis, i.e., what might be too close to a UGA or what might be too far. The Supreme Court has recognized this vagueness:

... Because the GMA does not dictate how much weight to assign each factor in determining which farmlands have long-term commercial significance, and because RCW 36.70A.030(10) includes the possibility of more intense uses among factors to be considered, it was not “clearly erroneous” for Lewis County to weigh the industry’s anticipated land needs above all else....⁷² Emphasis added.

Therefore, it is within the broad County’s discretion as to not only how much weight should be given each factor but, more importantly, as to what each factor means. Here, each of these ten factors was explicitly analyzed in the specific Amendment No. 2 Findings⁷³ and contained in the Amendment No. 2 itself. As a result, the County’s potential universe of agricultural lands was “culled” down to approximately 30,000 acres.⁷⁴

⁷¹ *Lewis County*, at 502 – footnote 11.

⁷² *Lewis County*, at 503.

⁷³ See CP 16 – AR 2383: Exhibit K to the Ordinance, at 3-8 of 23.

⁷⁴ CP 16 - AR 66: Exhibit 308, at 2.

E. The County's Five Acre Parcel Size Criterion Complies with the GMA

The County's limitation of designation criteria to parcels five acres or larger does not violate the GMA. Instead, selecting the actual criteria remains within the discretion of the County Council. Furthermore, nothing in the Act nor in the Minimum Guidelines specifies that a parcel smaller⁷⁵ than five acres must be used. In fact, both the GMA and the Minimum Guidelines are absolutely silent as to the precise "magic" number.⁷⁶ If either the legislature or CTED intended there to be a mandatory parcel size, the statute or regulations would have so provided.

Moreover, the *Lewis County* court explicitly approved of the Court of Appeals' approach in *Manke Lumber* – where Mason County was permitted to limit forest land designations to parcels of at least 5,000 acres because the Minimum Guidelines allow consideration of "predominant parcel size."⁷⁷

⁷⁵ Or larger than five acres for that matter – the County's un-appealed 1994 designations required a ten-acre minimum.

⁷⁶ Ironically, in its prior briefing below, Futurewise has claimed that the average size of a small farm in Pierce County is 4.5 acres. Yet, even assuming that such a statistic were *the* controlling factor, 4.5 rounded off to the nearest whole number is **five acres** – precisely the County's minimum.

⁷⁷ *Lewis County*, at 501, citing *Manke Lumber Co. vs. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), review denied, 137 Wn.2d 1018 (1999).

Pierce County elected to use the five acre minimum. It's rationale for doing so is contained in Amendment No. 2 itself:

Predominant parcel size: The predominant parcel size for the ARL designation is between 5 and 30 acres. Approximately 88 percent ARL parcels are less than 30 acres in size. According to the USDA Census of Agriculture, average farm size in Pierce County has varied over the past few Censuses. The 2002 County data indicates that the average size farm is 39 acres and the median size farm is 20 acres.⁷⁸ Emphasis added.

The County Council's Findings indicate that:

The County also chose to consider parcels that are five acres or larger in size based on the purity of map units explained in the Soil Survey Manual. Due to the minimum delineation size by map scale, soil class is more accurately determined using a scale 1:24,000 (approximately five acres).⁷⁹

The Board affirmed this position:

Likewise, the County's use of a minimum parcel size of five acres is within its discretion, neither the Act nor the CTED criteria require or prohibit minimum parcel sizes.⁸⁰

The predominate parcel size in Pierce County is between five and thirty acres. The County could have used the upper number in this range by making thirty acres the "magic" minimum designation number. Or, it could have used the 20-acre median. Either number would have been totally consistent with the Minimum Guidelines.

⁷⁸ See CP 16 – AR 2383: Exhibit K to the Ordinance - Amendment No. 2 Finding.

⁷⁹ CP 16 – AR 2383: Exhibit K to the Ordinance, at 7 of 23.

⁸⁰ *Bonney Lake*, at 19 of 62.

However, in light of the County's unique situation (*see* Phase I Report and its discussion and comparison of Pierce County's smaller farms within a heavily populated area contrasted to large farms in a sparsely populated areas like eastern Washington), rather than relying on the high end of the predominate parcel size range, the County elected to use the low end of that range when it created the five-acre minimum.⁸¹

Just as importantly, the County encourages farming on all rural lands regardless of size even though they have not been designated as ARL:

...The County encourages agricultural activities as appropriate land use throughout the rural area....⁸² ...Farming is encouraged throughout the rural area.⁸³

In addition, Amendment No. 2 itself contains provisions for designating lands smaller than five acres as ARL.⁸⁴ Moreover, as previously discussed, the County has subsequently (in 2006) adopted further

⁸¹ In addition, as indicated in the "Historical Background" of this brief, the average size of the 527 one- to nine-acre farms in Pierce County is 4.5 acres, which is also 5.0 acres when rounded off.

⁸² CP 16 – AR 2383: Exhibit B to the Ordinance, at 6 of 66; codified as PCC 19A.30.070.A.2.

⁸³ CP 16 – AR 2383: Exhibit B to the Ordinance, at 11 of 66; codified as PCC 19A.30.070 H.3.

⁸⁴ *See* CP 16 – AR 2383: Exhibit B to the Ordinance, at 8-9 of 66; codified as PCC 19A.30.070 B.3.a(1) and 19A.30.070 C.2.

legislation which enables agricultural land more than one acre in size be designated “Rural Farm.”

Finally, in *Lewis County*, the Supreme Court did rule, as Futurewise suggests, against a five acre designation. However, Futurewise misconstrues the facts. The *Lewis County* case involved a blanket exclusion of five acres. The designation would have allowed each farm to have a "farm center" of up to five acres where *non-agricultural* rural commercial and industrial uses would be allowed. The Court ruled that

... Thus, it was clearly erroneous for Lewis County to exclude from designated agricultural lands up to five acres on *every* farm without regard to soil, productivity or other specified factors in each farm area....⁸⁵ Italics in original.

Pierce County has not allowed non-agricultural uses on its designated ARL.

F. The County Did Not Violate the GMA and the Board Did Not Err in Affirming the Minimum Parcel Size Because It Correlated to the Accuracy of Soils Maps.

The “Minimum parcel size” portion of LU-Ag Objective 16 of Amendment No. 2 explained the five-acre threshold was used because soils data in this size “... is most reliable.”⁸⁶ Likewise, the County

⁸⁵ *Lewis County*, at 505.

⁸⁶ CP 16 – AR 2383: Exhibit B to the Ordinance, at 8 of 66.

Council further articulated in its Findings that:

The County also chose to consider parcels that are five acres or larger in size based on the purity of map units explained in the Soil Survey Manual. Due to the minimum delineation size by map scale, soil class is more accurately determined using a scale **1:24,000** (approximately five acres). Emphasis added.

The Board noted that the County's rationale was "... that this size correlated well to the accuracy [i.e., scale] of the soil maps as explained in the Soil Survey Manual."⁸⁷

The Board was correct in concluding that the County did not err.

The Soil Survey Manual is attached to an e-mail from Mr. Natsuhara.⁸⁸

The Pierce County Comprehensive Land Use Plan seemingly falls within the "third-order of surveys" discussed in the manual for:

... land uses that do not require precise knowledge of small areas or detailed soils information. Such survey areas are usually dominated by a single land use and have few subordinate uses. The information can be used in planning for range, forest, recreational areas, and in community planning.⁸⁹ Emphasis added.

The recommended base map scale range for a third-order survey is listed as between 1:20,000 and 1:63,300. Table 2-2 of the Soil Survey Manual indicates that the base map scale for 1:24,000 (i.e., the scale that Pierce County actually used) requires a minimum 5.7 acre delineation size.⁹⁰ In

⁸⁷ *Bonney Lake*, at 19.

⁸⁸ CP 16 – AR 66: Exhibit 162.

⁸⁹ CP 16 – AR 66: Exhibit 162, at 30.

⁹⁰ CP 16 – AR 66: Exhibit 162 – Table 2-2, at 29.

contrast, Pierce County could have used a 1:63,300 map scale, which requires a 40-acre minimum parcel size!

Moreover, even if the comprehensive plan were considered a “second-order survey,” the base map scale for it is between 1:12,000 [i.e., a 1.43 acre minimum] and 1:31,680 [i.e., a 10-acre minimum].⁹¹ Thus, the County could have used a 10-acre minimum. Instead, Pierce County utilized an appropriate map scale, well within its broad range of discretion. The Board did not err in affirming the use of this discretion.

IV. CONCLUSION

Amendment No. 2 of the Ordinance complies with the GMA. Futurewise has not met its burden of proof in showing how the County violated the GMA by its adoption. Futurewise may not like the County’s five-acre minimum criterion and its explanation for it. However, those choices are well within the wide realm of the County Council’s discretion.

Designating agricultural lands illustrates the difficulty any central Puget Sound county has in attempting to balance the conflicting interests between rapidly urbanizing areas and the desire to conserve agricultural lands. However, the use of the County’s discretion in this manner does not violate the GMA. It is a prime example of the County applying its

⁹¹ CP 16 – AR 66: Exhibit 162, at 28-30.

broad discretion in adapting the requirements of the GMA to local realities.⁹²

Unlike best available science, which the County must “include” in its *critical areas* regulations, no similar requirement exists for *agricultural lands*. The State has not provided local government with any precise requirements or objective measurements (by statute or regulation) for complying with the Act’s agricultural lands requirements. Instead, local governments are simply asked to “consider” the State’s Minimum Guidelines. Pierce County did review and consider those guidelines. But, those guidelines only list weightless factors; they do not provide objective measurements or requirements that must be met.

Several “solutions” are available to those who feel insufficient amounts of agricultural land are being designated. One was noted by the Supreme Court:

... If the State wants to conserve all land that is capable of being farmed without regard to its commercial viability, it may buy the land....⁹³

A second is for the State Legislature to amend the GMA more clearly and/or objectively. A third is for CTED to adopt more objective

⁹² *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 236, 110 P.3d 1132 (2005).

⁹³ *Lewis County*, at 509.

regulations (but that has not happened in sixteen years and is unlikely to occur without further amendment to the GMA). A fourth is to convince the Pierce County Council that it should use its discretion differently to designate additional acreage.

However, until the State either buys agricultural land or establishes objective definitions, local governments are simply required to “consider” the State’s Minimum Guidelines and then apply their “... broad discretion in adapting the requirements of the GMA to local realities....”⁹⁴ The Board was required to grant “broad deference” to the County’s use of its discretion in designating agricultural lands.⁹⁵ Likewise, the Court must give “substantial weight” to the Board’s interpretation of the GMA and conclude that the Board correctly interpreted and applied it.⁹⁶ Futurewise has not been substantially prejudiced by the Board’s decisions. Futurewise has not met its burden of proof. It failed to do so before the Central Puget Sound Growth Management Hearings Board and the

⁹⁴ *Quadrant Corp.*, at 236.

⁹⁵ *Quadrant Corp.*, at 237. *See also* RCW 36.70A.3201.

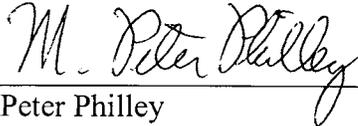
⁹⁶ *Lewis County*, at 498.

Thurston County Superior Court. It has now failed to do so before this
Court.

March 1st, 2007

Respectfully submitted,

GERALD A. HORNE
Prosecuting Attorney

By 
M. Peter Philley
Deputy Prosecuting Attorney
Attorneys for Pierce County
WSBA #14673
Phone: (253)798-4173

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent Pierce County was delivered this 1st day of March, 2007, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

Court of Appeals for the State of Washington Division II

Mr. David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300
Tacoma WA 98402-4454

Original + one copy

Central Puget Sound Growth Management Hearings Board

Ms. Martha P. Lantz
Assist. Attorney General, Licensing & Admin. Law Div.
State of Washington
P.O. Box 40110
Olympia WA 98504-0110

Alexandria K.F. Doolittle

Attorney at Law
1026 32nd Ave E
Seattle WA 98112

FUTUREWISE

Keith Scully, Legal Director
814 Second Ave., Suite 500
Seattle WA 98104

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY _____



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